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12/12/95



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

December 12, 1995

VIA FAX
AND U.S. MAIL

US EPA RECORDS CENTER REGION 5



469889

George B. Davis
Varnum, Riddering, Schmidt & Howlett
Bridgewater Place
P.O. Box 352
Grand Rapids, Michigan 49501
FAX (616) 336-7000

Re: Albion-Sheridan Landfill Site
Albion, Michigan

Dear Mr. Davis:

This letter responds to your letter dated December 7, 1995, to Steven Mendoza of the United States Environmental Protection Agency (EPA), Region 5, Office of Regional Counsel, and addresses issues raised during our telephone conversations yesterday regarding the above referenced Site.

First, as I indicated to you yesterday, the above referenced Site has been re-assigned in the Regional Counsel's Office from Steven Mason to myself. Therefore, any future correspondence should be addressed to the undersigned.

By this letter, EPA rejects the City of Albion's offer of \$60,000.00 to settle EPA's potential claims against the City under CERCLA. EPA rejects the City's offer for two general reasons: 1) EPA believes that additional information may exist which may further support a finding that the City of Albion is liable as an "operator" at the above referenced Site; and 2) EPA does not agree with the City of Albion's assessment of the facts under the case law.

I have reviewed your letters dated September 19, 1995, November 5, 1995, November 15, 1995, November 20, 1995, and December 7, 1995, to EPA regarding the City of Albion's potential liability at the Site. Your assertion that the City has been "improperly" characterized by EPA as an "operator" at the Site seems, in part, to be based on the findings in United States v. Cordova Chemical Company of Michigan, 59 F.3d 584 (6th Cir. 1995). First, as you may know, the United States has filed a

motion for re-hearing en banc in Cordova Chemical. The outcome of that motion may undermine your reliance on that case.

However, even if Cordova Chemical is upheld and the United States' motion is denied, the court there was clearly concerned with parent corporation liability - not "operator" liability of a municipality. In fact, the court in Cordova Chemical expressly limited its holding that "a parent corporation incurs operator liability pursuant to Section 107(a)(2) of CERCLA, for the conduct of its subsidiary, only when the requirements necessary to pierce the corporate veil are met." Cordova Chemical, 59 F.3d at 590. As you know, the City of Albion is not a "parent corporation". Therefore, Cordova Chemical is inapplicable.

There are cases which apply to liability of municipalities as "operators" under CERCLA, with similar facts as the City of Albion matter. As cited to you by previous counsel for EPA, and as the City of Albion seems to agree, the courts in Pierson Sand & Gravel v. Pierson Twp., 851 F. Supp. 850 (W.D. Mich. 1994) and Nurad Inc. v. William E. Hooper & Sons Co., 966 F.2d 837 (4th Cir. 1992) support EPA's position that the City of Albion would be found liable as an "operator" at the Site. (See Davis letter dated September 19, 1995 at n. 4).

As you know, the court in Pierson Sand & Gravel found that the "authority" to control operation of a landfill by a municipality is enough to hold the municipality liable as an "operator" under CERCLA. In our case, the City of Albion not only had the "authority" to control the operations of the landfill, but it exercised that authority through its decisions which affected the daily operation of the landfill. For example, not only did the City contract with the Stevicks for the use of the landfill by the residents and businesses of Albion, but the City also regulated the use of the landfill¹, determined which wastes would be accepted by the landfill and dictated disposal arrangements², determined the hours of operation for the landfill³, and continued to set landfill disposal rates⁴. In short, the day-to-day operations of the Albion-Sheridan Landfill were clearly controlled by decisions of the City.

¹ Council Proceedings, May 23, 1966 at 81.

² Council Proceedings, July 18, 1966, at 97.

³ Council Proceedings, November 7, 1966 at 132, and December 5, 1966 at 139.

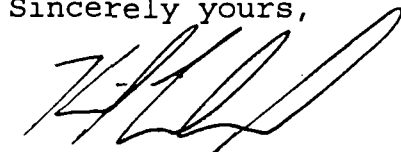
⁴ Council Proceedings, February 16, 1970 at 9; April 6, 1970 at 22; and April 20, 1970 at 26-27.

These and other facts support EPA's position that the City of Albion is potentially liable as an "operator" of the Site under CERCLA. Therefore, the City's settlement offer of \$60,000.00 is unacceptable.

As I indicated above and during our telephone conversation yesterday, EPA believes that additional evidence may exist which relates to the City's potential liability. While EPA believes it currently has sufficient evidence to show that the City is liable as an "operator" at the Site under CERCLA, before EPA can compromise a claim, it must be sure that such compromise is based on all the available information. During the next few weeks, EPA will ascertain the extent to which additional evidence is available which relates to the City's liability. Once that evidence is gathered, or EPA determines it possess all the relevant facts, EPA will contact you regarding further settlement negotiations.

If you have any questions regarding this matter, please do not hesitate to call me at (312) 886-6831.

Sincerely yours,



Kurt N. Lindland
Assistant Regional Counsel